

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue Date: 25 November 2003

BALCA Case No.: 2002-INA-281
ETA Case No.: P2000-CA-09501141/ML

In the Matter of:

THE GIRL'S RESTAURANT,
Employer,

on behalf of

JUAN RODRIGUEZ-GARCIA,
Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearance: Yvette Pizana
Santa Maria, CA
For Employer

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Juan Rodriguez-Garcia ("Alien") filed by The Girl's Restaurant ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record

upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On August 19, 1999, Employer filed an application for labor certification on behalf of the Alien for the position of Cook. (AF 69-70).

On April 3, 2002, the CO issued a Notice of Findings ("NOF ") indicating the intent to deny the application on the ground that there was insufficient evidence that Employer conducted a good faith recruitment effort. (AF 65-67). The CO noted that Employer received the resumes of two qualified applicants, Ms. Grinter and Mr. Serrano, on February 22, 2000, but Employer did not contact the applicants until a month later. On April 19, 2000, Employer received the resumes of two other qualified applicants, Ms. Ball and Ms. Neal, but Employer did not submit any documentation showing that it made a timely contact of these applicants. (AF 66).

The CO noted that positive contact efforts included contact in writing supported by dated return receipts and telephone contacts supported by telephone records. The CO concluded that there was insufficient evidence that Employer's alleged efforts to contact the applicants took place. Consequently, the CO found that Employer's recruitment efforts were insufficient, tardy, incomplete, and did not show a good faith recruitment effort. Employer was advised that the remedy to the deficiency was to provide details and documentation of Employer's recruitment efforts. (AF 66).

On April 18, 2002 Employer submitted its Rebuttal. Employer indicated that it received Ms. Grynter's resume in March 2000 and contacted her for an interview. Ms. Grynter responded but indicated that she had another job. Sometime after March 20, 2000, Employer contacted Mr. Serrano, who also declined an interview, as he felt he did not have the experience or qualifications for the job. Employer was unable to reach Ms. Ball by telephone; therefore, a letter was mailed to her on April 28, 2000. Ms. Neal was

no longer interested in the job because she started working with another employer. No supporting documents were submitted to confirm these statements. (AF 62-64).

On May 22, 2002, the CO issued a Final Determination (“FD”) denying certification. (AF 60-61). The CO found that Employer’s rebuttal failed to document its recruitment efforts, and without additional evidence, Employer’s rebuttal did not remedy the deficiency and did nothing to further its case. (AF 61).

Employer filed a Request for Review on June 24, 2002. (AF 1-3). Employer reiterated the details of the contact with the applicants and enclosed copies of telephone bills, as well as a copy of a form letter allegedly mailed to each applicant. (AF 4-59).

The AF does not reflect that a brief was filed.

DISCUSSION

An employer bears the burden of proof in labor certification applications to establish the appropriateness of approval and to ensure that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). A good faith effort at recruitment requires proof of reasonable efforts to contact the applicants. *Garment Associates*, 1991-INA-143 (July 14, 1992). An employer’s failure to establish that he made a diligent effort to contact applicants is a material defect in the recruitment effort. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*).

The CO in the NOF advised Employer that it had not properly documented its recruitment efforts. (AF 66). Employer had the opportunity and obligation to support its good faith recruitment efforts by providing evidence that the telephone calls were made, or by providing any other documentation supporting its recruitment efforts. However, no supporting evidence regarding the recruitment efforts was provided with the rebuttal. (AF 62-64).

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Denial of certification is proper when the employer fails to provide reasonably requested information. *O.K. Liquor*, 1995-INA-7 (Aug. 22, 1996). Under the regulatory scheme of 20 C.F.R. § 656.24, the rebuttal following the NOF is the employer's last chance to make his case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that certification should be granted. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

In lieu of documents, Employer in its Rebuttal made unsupported and self-serving statements alleging that it recruited in good faith. (AF 62-64). Bare assertions by an employer are not sufficient to carry the burden of demonstrating good faith recruitment. *See, e.g., Brilliant Ideas, Inc.*, 2000-INA-46 (May 22, 2000); *Inter-World Immigration Service*, 1988-INA-490 (Sept. 1, 1989).

We note that with the request for review, Employer submitted some documents in support of its position. However, evidence first submitted with a Request for Review will not be considered by the Board. *La Prairie Mining Limited*, 1995-INA-11 (Apr. 4, 1997); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992).

Even if the Board considered the new evidence, specifically telephone records, these are insufficient to support Employer's allegations of contact made. Employer submitted thirty-four pages of telephone records. (AF 12-59). On some pages, certain telephone numbers were circled or highlighted; however, none of these telephone numbers matched the telephone numbers of any of the applicants in question. (AF 38-51). These telephone bills do not establish Employer's alleged contact with the applicants.

Therefore, Employer's inadequate recruiting effort led to the finding that the applicants were not rejected for lawful, job-related reasons. *See, e.g., John & Winnie*

Ng, 1990-INA-134 (Apr. 30, 1991). Accordingly, as the record is sufficient to support the CO's denial of alien labor certification and for the above stated reasons, the following order will issue:

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the
Board of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five,